



U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

May 31, 2018

BY EMAIL AND ECF

The Honorable Ronnie Abrams
United States District Judge, Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: United States v. John Galanis, et al., S3 16 Cr. 371 (RA)

Dear Judge Abrams:

The Government writes in brief response to defendant Archer's letter regarding purported Sixth Amendment concerns regarding Michael Smith's testimony about the disclosure of conflicts of interest on the April 23, 2015.

Archer's concerns are illusory. First, a statement does not implicate the Confrontation Clause unless it is being offered for its truth. *See Tennessee v. Street*, 471 U.S. 409, 414 (1985) (admitting co-defendant's confession to rebut defendant's claim that his confession was coercively derived from co-defendant's); *United States v. Paulino*, 445 F.3d 211, 216-17 (2d Cir. 2006) (statements of defendant's father admitted to "aid the jury in understanding the course of events").

Second, only testimonial statements implicate the Confrontation Clause. A statement is "testimonial" when "in light of all the circumstances, viewed objectively," the 'primary purpose' of the conversation was to "creat[e] an out-of-court substitute for trial testimony." *Ohio v. Clark*, 135 S.Ct. 2173, 2180 (2015). The purpose of the disclosures on the April 23 call was clearly not to create a substitute for trial testimony.

In short, under Archer's argument all manner of inculpatory statements introduced routinely introduced at trial—for example, co-conspirators' statements on consensual recordings or Title III wiretaps—should be excluded under the Sixth Amendment. That is not the law, and for the reasons stated above and in last night's letter, Smith's testimony regarding the conflicts disclosures should be admitted.

Respectfully submitted,

ROBERT KHUZAMI

Attorney for the United States, Acting Under
Authority Conferred by 28 U.S.C. § 515

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